United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7389

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-7389

PATRICIA McREDMOND, et al., by their attorney and next friend, CHARLES SCHINITSKY, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

- against -

MALCOLM WILSON, individually and as Governor of the State of New York, et al.,

Defendants-Appellees.

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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STATEMENT

Although Appellees cite most of the prerequisites for application of the abstention doctrine, they present an erroneous and conclusory argument that the instant case presents such "special circumstances" which warrant the doctrine's use. Moreover, Plaintiffs-Appellants ("Appellants") have presented substantial claims other than those involving a right to treatment. Appellees' response to them is unpersuasive.

POINT I

THE DISTRICT IMPROPERLY APPLIED THE ABSTENTION DOCTRINE TO THE INSTANT CASE.

A.

In their "Brief for Defendants-Appellees," Defendants-Appellees ("Appellees") ignore the reality that the district court has ordered Appellants, in effect, to exhaust state remedies prior to litigating vital questions of civil rights. In erroneously emphasizing that "[a]ny decision by the New York Courts [concerning the treatment of PINS at training schools] will modify, and perhaps eliminate, the federal constitutional question" (see Appellees' Brief, p. 16), Appellees avoid the

principle that even if "the State has a law which if enforced would give relief," the state remedy "need not be first sought and refused before [a remedy under the Civil Rights Act] is invoked." Monroe v. Pape, 365 U.S. 167, 183 (1961); McNeese v. Board of Education, 373 U.S. 668, 672 (1963); Drexler v. Southwest Dubois School Corp., 504 F.2d 836 (7th Cir. 1974) (see Appellants' Brief, pp. 10-12, 24-25).

Rather, Appellees' brief is abundant with conclusory statements that this case presents "special circumstances" which warrant application of the abstention doctrine. For example, they argue that Appellants have a statutory right to treatment but neglect to mention that such right was interpreted by the New York State Court of Appeals through the eyes of due process. Matter of Lavette M., 35 N.Y.2d 135, 142 (1974); (see Appellants' Brief, pp. 23-24). Nor do Appellees mention that the federal courts have held that statutes which discuss the "custody, care and discipline" of juveniles imply a statutory right to treatment which must conform with a right to treatment under the due process clause of the Fourteenth Amendment. Nelson v. Heyne, 491 F.2d 352, 360 n.22 (7th Cir. 1974), cert. denied, 417 U.S.

976 (1974); see also, Morales v. Turman, 383 F.Supp. 53, 71 (E.D. Texas 1974); (see Appellants' Brief, pp. 20 and 22n).

Furthermore, Appellees, in arguing that Appellants have raised "sensitive" state administrative issues, totally ignore the significance of the several federal court cases in addition to Nelson and Morales, in which issues concerning the treatment of juveniles confined in state institutions were adjudicated. Martarella v. Kelley, 349 F.Supp. 575, enforced, 359 F.Supp. 478 (S.D.N.Y. 1972); Inmates of Boys' Training School v. Affleck, 346 F.Supp. 1354 (D.R.I. 1972); Lollis v. New York State Department of Social Services, 322 F.Supp. 473 (S.D.N.Y. 1970); (see Appellants' Brief, pp. 25-28).

Appellees' statement that these cases "presented extraordinary, perhaps emergency conditions, which would not countenance delay" while "Plaintiffs herein do not allege comparable conditions," is without merit (see Appellees' Brief, p. 23). Appellees have continuously overlooked the fact that Appellants have made a motion for a preliminary injunction in which they complained of suffering severe mental and physical abuse as a result of the use of solitary confinement, separa-

tion from family, friends and community, and inadequate educational opportunity and therapeutic counseling (see Appellants' Brief, pp. 35-38).

Most importantly, the federal courts in Martarella, Affleck and Lollis did not reject the defendants' requests for abstention merely because of any need for immediate action, but rather, as explicitly stated in Affleck, at 1358, found "no justification in precedent to apply the abstention doctrine....to [cases concerning] the conditions of confinement of juveniles." Appellants reemphasize that research has disclosed no case in which a federal court abstained from deciding a right to treatment clai.. (see Appellants' Brief, p. 26).

Appellees use some of the same ill-conceived arguments as the lower court to support abstention. For example, they stress those state statutes which establish the procedures for adjudication and placement of PINS as if Appellants' treatment claims were challenging such procedures. Appellants' right to treatment claims concern the conditions to which they are subjected as a result of training school placement (see Appellants' Brief, p. 17).

Judge Lasker, in Martarella v. Kelley, supra, at 579,

specifically recognized such distinctions, stating:

> Before we commence an exploration of the facts and the questions of law which they present, it is essential that the issues be focused. The plaintiffs do not challenge the constitutionality of the Family Court Act or the authority of Family Court judges to remove a non-delinquent child from his home on proper grounds. They do not contest the propriety of confining non-delinquent children in any secure setting. The issue they raise is limited to whether PINS may constitutionally be confined in the three named detention centers....

In fact, acceptance of Appellees' argument that the Family Court Act and Executive Law preempt constitutional issues concerning the treatment of juveniles placed under them would necessarily require rejection of all the previous federal court decisions on the treatment of juveniles and mental patients since those plaintiffs were also confined pursuant to the procedures and authorizations established under State law.

Despite the substantial precedent to the contrary, e.g., Nelson v. Heyne, supra; Morales v. Turman, supra, Appellees make a frivolous attempt to establish that Appellants' right to treatment under the Federal Constitution and relevant state statutes are not the same. They have continuously maintained that the "elements" of one right may be different

than the "elements" of the other (see Appellees' Brief, p. 16), without presenting any support for such conjecture, and, conveniently neglecting to mention that the statutory right has been based upon due process (see Appellants' Brief, pp. 21-25).

Additionally, the "elements" of treatment are clearly factual questions, not legal, and therefore do not involve interpretation of state law (see Appellants' Brief, pp. 18-21). Appellees' admission that "[w]hether the removal of some PINS from their homes and communities is essential for treatment is, of course, an issue for trial" seemingly indicates that they realize the "elements" of treatment are factual issues (see Appellees' Brief, p. 40).

Of course, in light of the lower court's decision, Appellees place much reliance on Reid v. Board of Education of City of New York, 453 F.2d 238 (2d Cir. 1971). Although Appellants have already discussed in detail the many factors which demonstrate the obvious inapplicability of Reid to the instant case (see Appellants' Brief, pp. 28-31), they reemphasize that Reid concerns the failure of the Board of Education to expeditiously evaluate and place "handicapped" chil-

dren in special classes, not the adequacy of the education received once placement is made.* Contrary to Reid, the instant case does not concern the adjudication of PINS, but rather the adequacy of treatment received following their adjudication. Hence, Reid concerns procedural and legal issues which the court found to be entangled in state laws and regulations while, on the other hand, the instant case concerns substantive and factual issues which are in no way "entangled in a skein of state law that must be untangled before the federal case can proceed." McNeese v. Board of Education, supra, at 674; (see Appellants' Brief, pp. 16-17).

B.

Appellees suggest that this case does not present extraordinary and exceptional circumstances (similar to those found in Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 [2d Cir. 1971]) which require the Court's

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* Appellants' attorneys have worked quite closely with the attorney who represents the petitioners in the Reid case, which is still pending before the State Commissioner of Education and, should the Court desire, will submit affidavits setting forth the issues in Reid.

attention.

However, as articulated in Appellants' Brief, pp. 35-38, these children who have not been found to have committed a crime, are suffering severe mental as well as physical harm. Appellees' affidavits do not rebut Appellants' claims. Rather, they place general blame on the children for the conditions under which they find themselves while failing to show that Appellants have been afforded any treatment. Finally, they insult the intelligence of the children and demonstrate insensitivity by suggesting that their affidavits be given no weight.

C.

Appellants strenuously reassert their position that no "plain, adequate and complete" remedy exists in the state courts which might otherwise allow the lower court to abstain in this case. Certainly by no stretch of the imagination can Family Court Act section 255 be viewed as an adequate state remedy so as to allow for abstention.

There is no case law to support the proposition that a challenge to the statutory authority to place children in

Training School would be heard on a motion pursuant to section 255 which must of necessity seek the "assistance and cooperation" of the particular public official. The cases cited by Appellees deal only with applications for individual assistance.

Nor is there any case law precedent in any form recognizing the right to class action relief in the Family Court.

More important is the fact that a careful analysis of the case law history of section 255 reveals the Family Court's aversion to applying the section in any but the narrowest situations. The only innovative case is Matter of Edward M., 76 Misc.2d 781, 351 N.Y.S.2d 601 (Fam.Ct., St. Lawrence Co. 1974); aff'd, 45 A.D.2d 906 N.Y.S.2d 918 (4th Dept. 1974), which not only deals with matters different than those at bar, but has thus far had no precedent setting value. For example, when the New York City Family Court was recently faced with an application under section 255 for an order requiring the Commissioner of Social Services to revamp his program for placement planning for adjudicated neglected children, the Court restricted itself to the problem of the particular child before it, noting there was "no authority"

for such a broad grant of relief. Dennis M., ___ Misc.2d ___, 370 N.Y.S.2d 458 (Fam.Ct., Bronx Co. 1975).

Additionally, the failure of the state courts to consider the claim of inadequate treatment at PINS training schools was specifically shown quite recently by the Appellate Division, Second Department in Matter of Gaylor A., ___A.D.2d ___ (2d Dept. 1975) (a copy of the Appeals Court decision dated September 11, 1975, is annexed to this Brief).

Upon appeal from a Family Court decision denying a motion to vacate an order of disposition because of lack of treatment at state training school (see Appellants' Brief, p. 35), the Second Department affirmed the decision of the Family Court. It held that the issue raised upon the appeal was moot because the child had been transferred from one training school to another during the pendency of the action. The Second Department was unwilling to consider the ability of the training schools generally to provide adequate treatment for the PINS girl despite the fact that the issue was raised in the Family Court and again on appeal.

POINT II

APPELLANTS PRESENT SUBSTANTIAL FEDERAL QUESTIONS WHICH REQUIRE THE CONVENING OF A THREE-JUDGE DISTRICT COURT.

A.

Appellants claim that their placement in state training schools geographically distant from their families, friends and communities constitutes cruel and unusual punishment *per se*. They also assert that such placement, by its very nature, unreasonably restricts their rights to associate and to travel. Although Appellees argue that these claims do not challenge the constitutionality of a state statute and, thus, convening of a three-judge court is not appropriate, a reading of Executive Law §510 establishes otherwise:

> §510. State schools in the division; establishment and control
>
> The [DFY] director may continue to maintain, as a state school or center, any institution formerly operated and maintained by the department of social services and in operation on July first, nineteen hundred seventy-one, and may add to or close any such place, and may establish and maintain new schools or centers....

Hence §510 explicitly authorizes the Division For Youth

to place PINS in those training schools in operation on July 1, 1971, which include Highland, Hudson, Tryon and Brookwood. Moreover, §510 explicitly allows DFY to maintain new institutions without regard to geographic considerations. Certainly, Appellants' claims that regardless of whether adequate treatment is provided, placement in distant institutions violates their constitutional rights, directly conflicts with such authorization.

Where a "state statute permits (but does not necessarily require)" the acts in question, the application of the statute may be constitutional in certain cases but arguably unconstitutional in the scheme under attack, and, accordingly, a three-judge court must be convened if the challenged acts are to be enjoined. Astro Cinema Corp., Inc. v. Mackell, 422 F.2d 293, 297 (2d Cir. 1970); Thomas v. Burke, 379 F.Supp. 231, 237 (D.R.I. 1974). Therefore, only a three-judge district court could abstain from deciding Appellants' "non-treatment claims" (see Appellants' Brief, pp. 39-41).

B.

Appellees assert that Appellants' cruel and unusual punishment, freedom to travel and freedom to associate claims do not present substantial federal questions. These claims must be considered substantial and must therefore be heard by the district court unless they are "so attenuated and unsubstantial as to be absolutely devoid of merit." Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579 (1904); Hagans v. Lavine, 415 U.S. 528, 536 (197).

Appellants submit that the substantiality of the claims is well demonstrated in their Brief (see Appellants' Brief, pp. 42-55). However, several comments made by Appellees require reply.

Appellees incorrectly apply absolute standards to determine whether the above claims are substantial. While admitting that PINS children are "undoubtedly entitled to different custody and treatment than prisoners..." (Appellees' Brief, p. 41), Appellees nevertheless proceed to apply cases concerning prisoners to Appellants' legal claims.

Appellants reiterate that the only possible constitutional justification for deprivation of the liberty of "tru-

ants," "runaways" and "disobedient" or "incorrigible" children, is to provide adequate and appropriate treatment. Therefore, when there are restrictions on Appellants' liberty, including their freedom to travel and associate, which are not essential for provision of adequate and appropriate treatment, substantial constitutional questions arise (see Appellants' Brief, pp. 42-54).

The specific deprivations of liberty complained of by Appellants do not result from their adjudications as PINS (see Appellees' Brief, p. 41), but rather from their placement in the named state training schools (see Appellants' Brief, pp. 42-54).

Finally, Appellees suggest that the "compelling state interest" test should not be applied to Appellants' equal protection claim, basing their argument in part upon prisoner's rights cases (see Appellees' Brief, p. 52). However, this case concerns the rights of children who have not been convicted of crimes, and other cases, including this Circuit's decision in Moctezuma v. Malcolm, No. 74-2427, 2482, Slip Op. 5279, 2d Cir. 7/31/75, as well as Lessard v. Schmidt, 349 F.Supp. 1078 (E.D.Wis. 1972), apply the compelling state

interest test and are controlling (see Appellants' Brief, pp. 47-52).

CONCLUSION

FOR THE FOREGOING REASONS THE LOWER COURT ORDER SHOULD BE VACATED AND THE CASE REMANDED FOR A PROPER CONSIDERATION OF ALL THE ISSUES RAISED IN THE COMPLAINT.

Dated: Brooklyn, New York
October 27, 1975

Respectfully submitted,

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Z/ms

A D 2d — A - September 11, 1975

1758 E

In the Matter of Gaylor A. (Anonymous), appellant.

Charles Schinitsky, Brooklyn, N. Y. (Michael J. Dale of counsel), for appellant.

Malcolm S. Goddard, New York, N. Y. (Gary Glaser of counsel), for respondent.

In a proceeding in which appellant was adjudged to be a person in need of supervision, she appeals from an order of the Family Court, Richmond County, dated May 12, 1975, which denied her motion inter alia to vacate the order which made said adjudication.

Order affirmed, without costs.

The issue raised on this appeal is moot. Appellant's complaint is solely as to the program of the Highland State Training School, in which she had been placed. However, she has been transferred out of that school.

RABIN, Acting P.J., LATHAM, COHALAN, MARGETT and CHRIST, JJ., concur.

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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PATRICIA McREDMOND, et al., by their attorney and next friend, CHARLES SCHINITSKY, on behalf of themselves and all others similarly situated,
Plaintiff
against
Plaintiffs-Appellants

MALCOLM WILSON, individually and as Governor of the State of New York, et al.,

~~Defendant~~
Defendants-Appellees

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF KINGS *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at
45 St. Felix Street, Brooklyn, New York.

That on October 28, *19* 75 *deponent served the annexed*
PLAINTIFFS-APPELLANTS' REPLY BRIEF
on LOUIS J. LEFKOWITZ, Attorney General, by Margery Reifler, Assistant
attorney(s) for Defendants-Appellees Attorney General
in this action at Two World Trade Center, New York, New York 10047
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this
28th day of October, 1975

Deborah Spector
The name signed must be printed beneath
DEBORAH SPECTOR

Michael J. Dale

MICHAEL J. DALE
Notary Public, State of New York
No. 30-6900150
Qualified in Nassau County
Certificate filed in Westchester County
Commission Expires March 30, 1976